FILED
JUL 30 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-1816

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

JAMES H. NEAL,
Petitioner,
v.
DISTRICT OF COLUMBIA, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

JOHN M. FERREN
Corporation Counsel

CHARLES L. REISCHEL
Deputy Corporation Counsel
Appellate Division

MARY L. WILSON
Assistant Corporation Counsel
Counsel of Record

Office of the Corporation Counsel
One Judiciary Square
441 4th Street, N.W.
Washington, D.C. 20001-2714
Tel: (202) 727-6252 ext. 3306

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2
A. Introduction 2
B. Background. 3
C. The Facts. 4
D. The Decisions Below. 6

REASONS FOR DENYING THE WRIT 7

I. THE FACTS PRESENTED IN THIS CASE DO NOT JUSTIFY REVIEW OF THE UNDERLYING LEGAL ISSUE. 8

II. BECAUSE OF THE UNIQUE CIRCUMSTANCES OF DISTRICT OF COLUMBIA PRISONERS, A DECISION BY THIS COURT HERE WOULD NOT NECESSARILY RESOLVE THE LEGAL ISSUE IN OTHER JURISDICTIONS. 13

TABLE OF AUTHORITIES

CASES

Abdullah v. Roach, 668 A.2d 801 (D.C. 1995) 3, 15

Bagguley v. Bush, 953 F.2d 660 (D.C.Cir. 1991), *cert. denied* 503 U.S. 995 (1992) 14

Barden v. Keohane, 921 F.2d 476

(3d Cir. 1990) 6, 13
Brooks v. DiFasi, 112 F.3d 46
(2d Cir. 1997) 10
Brown v. Plaut, 131 F.3d 163
(D.C.Cir. 1997), *cert. denied*,
66 U.S.L.W. 3799 (June 22, 1998) . . . . . passim
Carey v. Piphus, 435 U.S. 247 (1978) 12
Clarke v. Stadler, 121 F.3d 222, 226
(5th Cir. 1997), *rehearing en banc*
granted, 133 F.3d 940 (1997) 15
Crosby-Bey v. District of Columbia,
786 F.2d 1182 (D.C.Cir. 1986) 3
Curry-Bey v. Jackson, 422 F.Supp. 926
(D.D.C. 1976) 6
Edwards v. Balisok, 520 U.S. 641 (1997) 15
Griffin v. Vaughn, 112 F.3d 703
(3d Cir. 1997) 9
Heck v. Humphrey, 512 U.S. 477 (1994) 15
Hewitt v. Helms, 459 U.S. 460
(1989) 8, 10
Hudson v. Hardy, 424 F.2d 854
(D.C.Cir. 1970) 15
Keenan v. Hall, 83 F.3d 1083
(9th Cir. 1996) 9
Luken v. Scott, 71 F.3d 192
(5th Cir. 1995), *cert. denied*,
517 U.S. 1196 (1996) 10
Mackey v. Dyke, 111 F.3d 460 (6th Cir.),
cert. denied, 66 U.S.L.W. 3257
(1997) 10
Meachum v. Fano, 427 U.S. 215 (1976) 10
Montanye v. Haymes, 427 U.S. 236 (1976) 11
Olim v. Wakinekona, 461 U.S. 238 (1983) 11
Preiser v. Rodriguez, 411 U.S. 475 (1973) 15
Sandin v. Conner, 515 U.S. 472 (1995) . . . . . passim
Stone-Bey v. Barnes, 120 F.3d 718 (7th Cir. 1997) . . 15

United States v. Taylor, 485 F.2d 1077
(D.C.Cir. 1973) 5
Vaughn v. United States, 579 A.2d 170
(D.C. 1990) 5
Verrett v. Stempson, 623 A.2d 120
vacated as moot, 643 A.2d 902 (D.C. 1993) . . . 4
Wagner v. Hanks, 128 F.3d 1173
(7th Cir. 1997) 9, 10
Walton v. District of Columbia,
670 A.2d 1346 (D.C. 1996) 3
White v. Hyman, 647 A.2d 1175 (D.C. 1994) 4
Wright v. Coughlin, 132 F.3d 133
(2d Cir. 1998) 10

STATUTES AND REGULATIONS

D.C. Code § 24-402 (1996) 1, 5
D.C. Code § 24-425 (1996) 1, 5
D.C. Code § 24-442 (1989) 3
Lorton Regulations Approval Act of 1982,
D.C. Law 4-153; 29 D.C.Reg. 3484-3485
(Aug. 13, 1982) 1, 3, 14, 17, 20
Balanced Budget Act of 1997, Pub.L. 105-33
(Aug. 5, 1997), Title XI, National Capital
Revitalization and Self-Government Act of
1997, Subtitle C, Criminal Justice, § 11201;
D.C.Code § 24-1201 . . . . . 1, 14, 17, 20
28 DCMR Chapter 5 (1987) at
§§ 520.2-520.4, 521.2-521.4,
521.12 (1987) 3

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

97-1816

JAMES H. NEAL,
Petitioner,
v.
DISTRICT OF COLUMBIA, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 131 F.3d 172, and appears in the petitioner's appendix ("App.") at 1a-8a. The D.C. Circuit's unpublished orders denying rehearing and rehearing en banc are set out at App. 30a-33a.

STATUTORY PROVISIONS

Statutory provisions cited in this brief in opposition that are not contained in the petitioner's appendix are set forth in the appendix bound with this brief. They are: D.C. Code §§ 24-402, 425 (1996); the "Lorton Regulation Approval Act of 1982," D.C. Law 4-153, 29 D.C.Reg. 3484-3485 (Aug. 13, 1982); Balanced Budget Act of 1997, Pub.-L. 105-33 (Aug. 5, 1997), Title XI, National Capital Revitalization and Self-Government Act of 1997, Subtitle C, Criminal Justice, § 11201, D.C.Code § 24-1201 (1996, 1998 Supp.).

STATEMENT OF THE CASE

A. Introduction The District of Columbia Circuit properly concluded, in a decision written by Judge Wald, that a prisoner's placement in protective custody -- where he was allowed out of his cell four to nine hours a day -- did not infringe a sufficiently significant interest to warrant protection under the Constitution, regardless of the full reach of the "atypical and significant hardship" standard of *Sandin v. Conner*, 515 U.S. 472 (1995).

Under *Sandin*, a state-created liberty interest in the prison context should be "limited to freedom from restraint which ... imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." 515 U.S. at 484. The D.C. Circuit found in this case and the companion case of *Brown v. Plaut*, 131 F.3d 163 (D.C.Cir. 1997), *cert. denied*, 66 U.S.L.W. 3799 (June 22, 1998), that "application of *Sandin* raised difficult questions," App. 6a, because "it is not clear which prison or part of a prison" should represent the ordinary incidents of prison life as a standard for comparison. *Brown*, 131 F.3d at 169. Other Courts of Appeals have struggled with the same issue with varying results. But this case is not the vehicle for resolving the uncertainty as to the reach of the *Sandin* standard because the conditions Neal experienced in protective custody are plainly insufficient to warrant constitutional concern under any plausible reading of *Sandin*.

Further, a case involving a District of Columbia prisoner may not be the right vehicle in which to resolve the reach of *Sandin* because of the unique circumstances of District of Columbia prisoners: 1) by statute, D.C. prisoners are committed to the custody of the Attorney General who can place them in any prison nationwide, so the "ordinary incidents of prison life" for D.C. prisoners may not be the same as for other state prisoners; and 2) the District of Columbia's Lorton Correctional Complex, where Neal was incarcerated, will be closed by the year 2001 pursuant to

federal legislation, so any determination of the "ordinary incidents of prison life" there would have limited applicability even locally.

B. Background. James Neal is a District of Columbia convict serving consecutive sentences totaling 49 to 147 years imposed by the D.C. Superior Court in 1987 for multiple counts of robbery and robbery of a senior citizen, and one count of unauthorized use of a motor vehicle. See Exhibit 1 to the defendant's motion to dismiss or for summary judgment in the district court ("defendant's dispositive motion"). In this action, Neal claims an entitlement to money damages because the District of Columbia Department of Corrections kept him in involuntary protective custody (also known as administrative segregation) for about six months at the Maximum Security Facility at the District of Columbia's Lorton Correctional Complex without making a determination that he was an escape risk, a threat to others, or that he faced a threat from others, as required under local District of Columbia prison regulations applicable to Lorton.[1/]

Although the Lorton regulations are binding on the Department of Corrections to the extent they can be enforced in local habeas corpus proceedings, *Walton v. District of Columbia*, 670 A.2d 1346 (D.C. 1996); *Abdullah v. Roach*, 668 A.2d 801 (D.C. 1995), it is an open question whether they create a liberty interest protected by due process. See, *Crosby-Bey v. District of Columbia*, 786 F.2d 1182, 1183 n.2 (D.C.Cir. 1986) (assuming without deciding that Lorton regulations create a constitutionally protected liberty interest in remaining in general prison population

---

[1/] 28 DCMR Chapter 5 (1987) at §§ 520.2-520.4, 521.2-521.4, 521.12 (1987); App. 50a-52a. Pursuant to D.C. Code § 24-442 (1989) (requiring the Council of the District of Columbia to approve Department of Corrections regulations), the Council approved the regulations in the "Lorton Regulations Approval Act of 1982," D.C. Law 4-153, 29 D.C.Reg. 3484-3485 (Aug. 13, 1982) ("LRAA").

because it appeared that prisoner received all process due when transferred to administrative segregation even if he had such a liberty interest); *Brown v. Plaut*, 131 F.3d at 169 (same); *Abdullah*, 668 A.2d at 810 n. 14 (raising but not resolving constitutional issue). Nor, in the District's view, do the regulations create a private cause of action for damages based on their violation, although no court has reached this issue.[2/]

C. The Facts. The facts relevant to Neal's claim are succinctly set out in the D.C. Circuit's decision. App. 2a-4a. In a nutshell, Neal was initially placed in protective custody at the Maximum Security Facility at Lorton with his consent. But, after he requested that he be moved to the general population at Maximum, the District kept him in segregated confinement for another six months, without holding a hearing on his request in accordance with the local prison regulations and without making an explicit determination that he was a safety or security risk. During this period:

> [Neal] was allowed to leave his cell for nine hours a day three days a week, for six and a half hours (or longer if he had a visitor) for two days a week, and for five and six hours respectively on the remaining two days. He was allowed a total of eight hours a week outdoors, in a small courtyard. He did not have easy access to the gym, mailroom, law library, or medical unit (although other arrangements were made for provision of these services), and he could not work at a prison job.

[2/] *Verrett v. Stempson*, 623 A.2d 120 (D.C. 1993), cited by petitioner at 9 n.6, was vacated as moot, *Verrett v. Stempson*, 643 A.2d 902 (D.C. 1993) and has no precedential value. *White v. Hyman*, 647 A.2d 1175, 1181 n.9 (D.C. 1994).

App. 7a.

It is relevant to *Sandin's* "atypical and significant hardship" standard that Neal has been in several different prison settings during his incarceration. The Lorton Correctional Complex contains many different prison facilities with different levels of security. In 1987, Neal was placed at the Modular Facility at Lorton. He was then transferred to serve his sentences at the federal prison in Leavenworth, Kansas. He was transferred back to Lorton in 1992, where he was initially placed at the Occoquan Facility. Exhibits 2-3 to defendant's dispositive motion; Declaration of James Neal (attached as exhibit to plaintiff's motion for summary judgment in the district court) at 1. Neal was then transferred to the Maximum Security Facility at Lorton, and placed in administrative custody in cellblock #1 with his consent. App. 7a. Eventually, he asked to be moved to the open population at Maximum, which is where he was in fact placed after he was ultimately removed from cellblock #1. App. 4a.[3/]

As the D.C. Circuit recognized in the companion case of *Brown v. Plaut*, 131 F.3d at 169, a D.C. prisoner like Neal is committed to the custody of the Attorney General of the United States, who has the authority to designate where the prisoner shall serve his sentence, and can transfer the prisoner to Lorton, or any federal, state, or contract penal facility in the country. See, D.C. Code §§ 24-402 and 425 (1996); *United States v. Taylor*, 485 F.2d 1077 (D.C.Cir. 1973) (D.C. prisoner is in custody of Attorney General even at private halfway house operated under contract with the D.C. Department of Corrections); *Vaughn v. United States*, 579 A.2d 170, 173 (D.C. 1990) (D.C. pris-

---

[3/] While this case was pending in the lower courts, Neal was transferred to a private prison in Youngstown, Ohio, where the District of Columbia has contracted to house some of its prisoners. This transfer does not render this case moot since Neal is seeking money damages.

oner can be transferred to state as well as federal facility).[4/]

Neal contends in this case that his confinement in administrative segregation implicated a protected liberty interest because the conditions in segregation were "more restrictive" than those in the general population at Maximum *where he wished to be placed*, and where he was in fact eventually placed. Petition at 3. Neal never described the conditions he experienced at the federal facility in Leavenworth, or those at the Occoquan or Modular Facilities at Lorton, and never asserted that the conditions in protective custody in the Maximum Facility at Lorton were more restrictive than those at Leavenworth or in other prisons elsewhere in the country where the Attorney General has the discretion to transfer him.

D. The Decisions Below. After this Court's decision in *Sandin v. Conner*, the district court concluded that the conditions Neal had experienced in protective custody "represented a significant deprivation from the conditions in the general population" at the Maximum Security Facility. App. 20a. However, the district court recognized, and Neal conceded, that, absent the local prison regulations, Neal would have no basis for a § 1983 action. The district court then decided as a matter of comity that the local District of Columbia courts should decide in the first instance whether the District's prison regulations created a private right of action, and dismissed Neal's entire suit. App. 14a-16a, 20a. The district court noted its "fears" that, if it granted Neal relief, "the Federal Courts [would] be flooded with

---

[4/] The Attorney General's authority in this regard appears to be totally discretionary. See, *Barden v. Keohane*, 921 F.2d 476 (3d Cir. 1990) (Attorney General has broad discretion to choose place of federal prisoner's incarceration, including choosing a state prison); *Curry-Bey v. Jackson*, 422 F.Supp. 926, 932 (D.D.C. 1976) (Attorney General's authority to designate place of D.C. prisoner's confinement is "clear and apparently limitless").

untold numbers of prisoner damages cases alleging violations" of the D.C. prison regulations. App. 14a.

On appeal, the District of Columbia Circuit rejected the district court's reasoning, but nevertheless affirmed the dismissal. App. 2a, 5a, 10a. The D.C. Circuit recognized that a prisoner might establish a § 1983 claim for deprivation of a protected liberty interest derived from local statutes or regulations even if local law did not create a cause of action. The Court of Appeals concluded, however, that Neal had no viable claim because he had no liberty interest in remaining free of the conditions imposed on him in administrative segregation, "under any plausible reading of *Sandin*." App. 6a. The Court ruled that, even if the standard for determining whether Neal suffered an "atypical and significant" deprivation was to compare his circumstances in administrative segregation with those in the general population at the Maximum Security Facility, the deprivation was "comparable to that at issue in *Sandin*" where the deprivation was "considerably more severe" although it only lasted 30 days. App. 7a.

REASONS FOR DENYING THE WRIT

Although application of the *Sandin* "atypical and significant hardship" standard has created uncertainty in the lower federal courts, this case is not the proper vehicle to resolve that uncertainty because, under any reading of *Sandin*, there is a due process-triggering threshold that was not crossed in this case. The conditions Neal endured are simply insufficient to warrant constitutional concern under *Sandin*.

Further, a case involving a District of Columbia prisoner may not be the proper vehicle for establishing a definition of "the ordinary incidents of prison life" under *Sandin* that could be applied to state prison systems because, by statute, D.C. prisoners are committed to the custody of the Attorney General who can place them in the District's Lorton Correctional Complex or any prison na-

tionwide. Indeed, any precedent defining the ordinary incidents of prison life at Lorton would have limited applicability even locally because, under federal legislation, the Lorton Correctional Complex where Neal was incarcerated is mandated to be closed by 2001.

This case does not warrant further review by the Court.

I. THE FACTS PRESENTED IN THIS CASE DO NOT JUSTIFY REVIEW OF THE UNDERLYING LEGAL ISSUE.

This case is not the vehicle for resolving the uncertainty as to how to apply *Sandin* because the conditions Neal experienced in protective custody are plainly insufficient to warrant constitutional concern under any plausible reading of *Sandin*.

1. *Sandin* dramatically redefined the law with respect to state-created liberty interests in the prison context. Under the earlier standard used in *Hewitt v. Helms*, 459 U.S. 460 (1989), constitutionally protected liberty interests were deemed created when state statutes restricted the discretion of prison administrators to place a prisoner in segregation. Under the *Hewitt* methodology, the inquiry was "whether the State had gone beyond issuing mere procedural guidelines and had used 'language of an unmistakably mandatory character' such that the incursion on liberty would not occur 'absent specified substantive predicates.'" *Sandin*, 515 U.S. at 480, citing *Hewitt*, 459 U.S. at 471-472.

The Court abandoned this approach in *Sandin*, however, because it had produced "at least two undesirable effects." 515 U.S. at 482 and n. 5 First, it created disincentives for states to codify prison management procedures in the interest of uniform treatment and in the interest of instructing prison employees how to handle their duties. Second, the *Hewitt* approach "led to the involvement of

federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone." *Id.* at 482. Accordingly, the Court ruled that a state's statutory system pertaining to an inmate's discipline and segregation will create a liberty interest worthy of due process protection only if it "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Id. at 484.

2. This standard has, concededly, created unanticipated problems. The lower federal courts are struggling to define "the ordinary incidents of prison life." The D.C. Circuit did not resolve the issue in this case or the companion *Brown* case but observed that "[a]t various points in *Sandin*, the Court compared the prisoner's conditions in disciplinary segregation in Hawaii's Halawa Correctional Facility to 'administrative segregation and protective custody' in that prison, to the 'general population' of that prison, and to an undefined 'range of confinement to be normally expected for one serving an indeterminate term of 30 years to life.'" *Brown*, 131 F.3d at 169, citing *Sandin*, 515 U.S. at 486-87.

Other Courts of Appeals have differing views on how to determine the ordinary incidents of prison life. *See*, *Wagner v. Hanks*, 128 F.3d 1173, 1176 (7th Cir. 1997) (Posner, C.J.) (concluding that "atypical and significant" turned on a comparison with conditions in the state's most rigorous prison, but noting that *Sandin* might require a nationwide standard since state prisoners are frequently transferred to other state prisons under interstate compacts, and indicating that "clarification of the issue" from this Court would be "welcome"); *Griffin v. Vaughn*, 112 F.3d 703, 706 and n. 2 (3d Cir. 1997) (the "ordinary incidents of prison life" are ascertained by what a sentenced inmate may reasonably expect to encounter as a result of his or her conviction in accordance with due process of law); *Keenan v. Hall*, 83 F.3d 1083, 1088 (9th Cir. 1996) (suggesting that the baseline for determining "atypical and significant"

turns on the length of the deprivation and a comparison of conditions in segregation and that prison's general population); *Brooks v. DiFasi*, 112 F.3d 46, 48-49 (2d Cir. 1997) (same); *Luken v. Scott*, 71 F.3d 192, 193 (5th Cir. 1995), *cert. denied*, 517 U.S. 1196 (1996) (concluding that term in administrative segregation was not "atypical and significant" without discussing conditions in segregation or length of that term in segregation); *Mackey v. Dyke*, 111 F.3d 460, 463 (6th Cir.), *cert. denied*, 66 U.S.L.W. 3257 (1997) (concluding that six month term in administrative segregation was not "atypical and significant" without discussing conditions in segregation).

Some courts are conducting an exhaustive comparison of conditions in and out of segregation to ascertain if the prisoner experienced an atypical and significant deprivation, thus defeating *Sandin's* purpose to reduce the "involvement of federal courts in the day-to-day management of prisons." *See*, e.g., *Wagner*, 128 F.3d at 1176-1177 (remanding for development of factual record as to whether conditions in disciplinary segregation were more restrictive than conditions elsewhere in state's prison system); *Wright v. Coughlin*, 132 F.3d 133, 137 (2d Cir. 1998)(emphasizing need for district courts to conduct extensive fact finding before determining
whether a prisoner has a liberty interest in remaining free from segregated confinement).

3. Of course, atypicality, by itself, cannot establish a liberty interest. That much is clear from *Sandin*, which expressly reaffirmed the decision in *Meachum v. Fano*, 427 U.S. 215 (1976), which held that procedural due process was not required when an inmate was transferred from a medium security to a maximum security prison. 515 U.S. at 478. Therefore, local statutes and regulations must still form a part of the basis of any liberty interest concerning segregated confinement. See also, *Hewitt v. Helms*, 459 U.S. 460, 466-467 (1983) (the Due Process Clause itself does not implicitly create "an interest in being confined to a

general population cell, rather than the more austere and restrictive administrative segregation quarters"); *Montanye v. Haymes*, 427 U.S. 236, 242 (1976) (due process clause not implicated by state prisoner's transfer to another state prison for breach of prison rules, even where transfer involves "substantially burdensome consequences"); *Olim v. Wakinekona*, 461 U.S. 238 (1983) (inmate's transfer from Hawaii prison to less advantageous prison on mainland did not implicate liberty interest).

The District submits that, to prevail under *Sandin*, an inmate must establish both that 1) the confinement or restraint imposed an atypical and significant hardship as compared to the most restrictive prison nationwide, because that is what a sentenced inmate can reasonably expect to encounter as a result of his or her conviction in accordance with due process of law; and 2) the state has granted its inmates, by statute, an expectation in remaining free from that confinement or restraint absent certain defined substantive predicates. Neal's suggested approach, that "atypical and significant" is based on a determination of whether prison officials have discretion to place prisoners in similar settings, petition at 9-10, is an untenable attempt to return to the *Hewitt* methodology abandoned in *Sandin*.

4. But this case is not the case for resolving these issues because, under any plausible reading of *Sandin*, Neal was not deprived of a protected liberty interest here. As Judge Wald recognized below, spending six months in a cellblock where Neal was allowed out of his cell nine hours a day three days a week, for six and a half hours (or longer if he had a visitor) for two days a week, and for five and six hours respectively on the remaining two days, and where he was allowed a total of eight hours a week outdoors, is simply not the type of deprivation entitled to due process protections after *Sandin*. It is so whether the proper basis of comparison is the less restrictive general population at the Maximum Security Facility where Neal was eventually placed, the federal prison at Leavenworth where

Neal spent several years, or any other prison nationwide. This is especially so considering that protective custody in no way stigmatized Neal or diminished his parole prospects. *Cf., Sandin*, 515 U.S. at 488-489 (Ginsburg, J. dissenting) (noting that disciplinary confinement, but not protective custody, can diminish parole prospects).

The D.C. Circuit was absolutely correct that, after *Sandin*, there are certain restrictions and conditions of confinement that simply do not trigger the due process clause regardless of any regulations or statutes restricting the imposition of such conditions, and that the conditions imposed on Neal do not trigger the due process clause here. In short, Neal's administrative segregation was not so clearly out of the realm of prison experiences as to warrant due process protection. Further review is not warranted here.[5/]

[5/] Even if Neal could show here that he was subjected to an atypical and significant hardship within the meaning of *Sandin*, he still could not establish a liberty interest derived from the District's Lorton regulations. These regulations do not include any guidelines, standards, or rules restricting prison officials' determination as to when a prisoner should be considered a safety or security risk who needs protective custody. A prisoner may be placed in administrative segregation as a security matter if the prisoner poses an escape risk, is a danger to others, or the safety or health of the prisoner is threatened. 28 D.C.M.R.§§ 520.2-.4; App. 50a. However, the regulations do not define safety and security risks, and do not limit which factors prison officials can consider in making such a determination. Such a discretionary and open-ended determination cannot be construed to give rise to a liberty interest.

Further, Neal is not entitled to anything more than nominal damages, unless he can show he would have been promptly removed from segregated confinement if he had received appropriate due process. *Carey v. Piphus*, 435 U.S. 247 (1978).

II. BECAUSE OF THE UNIQUE CIRCUMSTANCES OF DISTRICT OF COLUMBIA PRISONERS, A DECISION BY THIS COURT HERE WOULD NOT NECESSARILY RESOLVE THE LEGAL ISSUE IN OTHER JURISDICTIONS.

Because District of Columbia prisoners are committed by statute to the custody of the Attorney General, who can place them in any federal or state prison in the country, this case is not necessarily the vehicle for determining a definition of the "ordinary incidents" of prison life under *Sandin* that would apply to state prisoners committed to state prison systems.

The District submits that *Sandin* should be applied in a fashion that creates a consistent nationwide standard for determining when a prisoner has a protected liberty interest to be free of segregated confinement. A definition of an "atypical and significant hardship" that is based on a state-by-state
-- or case-by-case, or prison-by-prison -- comparison of conditions (or as Neal would have it, a cellblock-by-cellblock comparison) would create different thresholds for a liberty interest in different jurisdictions depending on the conditions in that jurisdiction's prisons. Ironically, a prisoner in a restrictive, high security prison system might have fewer due process rights than a prisoner in a lower security prison system because the ordinary incidents of prison life would be more severe for the former prisoner. "Liberty that may vary from Ossining, New York, to San Quentin, California, does not resemble the 'Liberty' enshrined among 'unalienable Rights' with which all persons are 'endowed by their Creator.'" *Sandin*, 515 U.S. at 489 (Ginsburg, J., dissenting), quoting Declaration of Independence.

Further, a uniform nationwide standard makes sense considering that both federal and state prisoners are routinely transferred to other prisons. *Barden v. Keohane*, 921 F.2d 476 (3d Cir. 1990) (attorney general has broad discretion to choose place of federal prisoner's incarceration,

including choosing a state prison); *Wagner v. Hanks*, 128 F.3d at 1176 (states frequently "swap" prisoners with other states, and it "makes a good deal of sense to view the entire federal and state jail and prison system as a single system").[6/]

However, any resolution of the issues in this case that is based on the statutory authority of a national official -- the Attorney General -- to designate the place of confinement of D.C. prisoners in state, federal, or contract facilities, might have limited value as precedent for prisoners in other jurisdictions. Accordingly, a case involving a District of Columbia prisoner may not be the appropriate case to resolve the reach of *Sandin*.

In addition, the District notes that, under federal legislation, the Lorton Correctional Complex where Neal was incarcerated is mandated to be closed by 2001, so the "ordinary incidents of prison life" at Lorton itself will be obsolete at that time. See, Balanced Budget Act of 1997, Pub.L. 105-33 (Aug. 5, 1997), Title XI, National Capital Revitalization and Self-Government Act of 1997, Subtitle C, Criminal Justice, § 11201, D.C. Code § 24-1201 (providing for felons sentenced under D.C. law to be transferred to federal prisons and for Lorton to close by December 31, 2001).

Moreover, the prison regulations at issue in this case are applicable only to the Lorton Correctional Complex, "Lorton Regulations Approval Act of 1982," D.C. Law 4-153, 29 D.C.Reg. 3484-3485 (Aug. 13, 1982), and, the District submits, will no longer have any significance when Lorton is closed. Accordingly, a determination of whether

---

[6/] In addition, foreign prisoners can be transferred to their home countries to serve their sentences, suggesting that there could be an international standard of comparison. *Bagguley v. Bush*, 953 F.2d 660 (D.C.Cir. 1991), *cert. denied* 503 U.S. 995 (1992).

those regulations create a liberty interest will not have lasting impact even for the District of Columbia.[7/]

[7/] Any grant of certiorari in this case must necessarily involve review of whether the D.C. Circuit properly concluded that this case and the companion *Brown* case were cognizable under § 1983, and did not have to be pursued in habeas corpus under the dictates of *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Heck v. Humphrey*, 512 U.S. 477 (1994); and *Edwards v. Balisok*, 520 U.S. 641 (1997). In this regard, there is a conflict in the Circuits: *Clarke v. Stadler*, 121 F.3d 222, 226 (5th Cir. 1997) (if a favorable determination of prisoner's claim would not automatically entitle the prisoner to accelerated release, as where sanction included loss of good time credit, the proper vehicle for suit is § 1983), *rehearing en banc granted*, 133 F.3d 940 (1997); *Stone-Bey v. Barnes*, 120 F.3d 718 (7th Cir. 1997) (*Edwards* applies to preclude § 1983 claim in a case in which the prisoner was subject only to disciplinary segregation, and not to any loss of good time credits or any other change in the length of confinement); *Brown v. Plaut*, 131 F.3d at 168 and n.5 (finding *Stone-Bey* unpersuasive; endorsing approach of *Clarke*).

Here, the reasoning of *Preiser* and its progeny dictate that Neal's challenge to the administrative decisions to place him, and keep him, in segregated confinement cannot be brought under § 1983. A decision in Neal's favor here would necessarily imply the invalidity of the administrative decision to place and keep him in segregated confinement, and, as in *Preiser*, Neal's allegedly illegal confinement in protective custody could be challenged in a habeas corpus proceeding. *See*, *Hudson v. Hardy*, 424 F.2d 854, 855 and n.3 (D.C.Cir. 1970) (prisoner's claim that he was subject to cruel and unusual treatment in prison, apparently by being placed in control cell, could be brought as habeas corpus petition or as request for injunctive relief under 42 U.S.C. § 1983); and *Abdullah v. Roach*, 668 A.2d 801 (D.C. 1995) (habeas corpus challenge to administrative segregation). Accordingly, since Neal had a viable habeas corpus remedy to challenge the administrative action keeping him in cellblock #1, his claim is simply not cognizable under § 1983. The D.C. Circuit's judgment that Neal's complaint did not state a viable claim could be affirmed on the alternative ground that Neal had to pursue his claim in habeas corpus.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

JOHN M. FERREN
Corporation Counsel, D.C.

CHARLES L. REISCHEL
Deputy Corporation Counsel
Appellate Division

MARY L. WILSON
Assistant Corporation Counsel
Counsel of Record

Office of the Corporation Counsel
One Judiciary Square
441 4th Street, N.W.
Washington, D.C. 20001-2700
Tel: (202) 727-6252 ext. 3306

July 1998

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

97-1816

JAMES H. NEAL,
Petitioner,
v.
DISTRICT OF COLUMBIA, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX TO BRIEF IN OPPOSITION

TABLE OF CONTENTS

A. D.C. Code § 24-402 (1996)

B. D.C. Code § 425 (1996)

C. The "Lorton Regulations Approval Act of 1982," D.C. Law 4-153, 29 D.C.Reg. 3484-3485 (Aug. 13, 1982)

D. Balanced Budget Act of 1997, Pub.L. 105-33 (Aug. 5, 1997), Title XI, National Capital Revitalization and Self-Government Act of 1997, Subtitle C, Criminal Justice, § 11201, D.C. Code § § 24-1201 (1996, 1998 supp.)

D.C. Code § 24-402. Imprisonment for more than 1 year; jurisdiction over Reformatory prisoners; transfer from penitentiary to Reformatory.

Whenever any person has been convicted of crime in any court in the District of Columbia and sentenced to imprisonment for more than 1 year by the court, the imprisonment during the term for which he may have been sentenced or during the residue of said term may be in some suitable jail, or penitentiary, or in the Reformatory of the District of Columbia; and it shall be sufficient for the court to sentence the defendant to imprisonment in the penitentiary without specifying the particular prison or the Reformatory of the District of Columbia; and the imprisonment shall be in such penitentiary, jail, or the Reformatory of the District of Columbia as the Attorney General shall from time to time designate; provided, that the Mayor of the District of Columbia is vested with jurisdiction over such male and female prisoners as may be designated by the Attorney General for confinement in the Reformatory of the District of Columbia from the time they are delivered into his custody or into the custody of his
authorized Superintendent, deputy, or deputies, and until such prisoners are released or discharged under due process of law; and provided further, that the residue of the term of imprisonment of any person who has prior to July 1, 1916, been convicted of crime in any court in the District of Columbia and sentenced to imprisonment for more than 1 year by the court may be in the Reformatory of the District of Columbia instead of the penitentiary where such persons may be confined on July 1, 1916, and the Attorney General, when so requested by the Mayor of the District of Columbia, is authorized to, and he shall, deliver into the custody of the Superintendent of said Reformatory or his deputy or deputies any such person confined in any penitentiary in pursuance of any judgment of conviction in and sentence by any court in the District of Columbia, and the Mayor of the District of Columbia is vested with jurisdiction over such

prisoners from the time they are delivered into the custody of said Superintendent or his duly authorized deputy or deputies, including the time when they are in transit between such penitentiary and the Reformatory of the District of Columbia, and during the period they are in such Reformatory or until they are released or discharged under due process of law. The Attorney General shall pay the cost of the maintenance of said prisoners so transferred, said payment to be from appropriations for support of convicts, District of Columbia, in like manner as payments are made for the support of District convicts in federal penitentiaries. Nothing herein contained shall be construed as applying to the National Training School for Boys or the National Training School For Girls.

D.C. Code § 24-425. Place of Imprisonment.

All prisoners convicted in the District of Columbia for any offense, including violations of municipal regulations and ordinances and acts of Congress in the nature of municipal regulations and ordinances, shall be committed, for their terms of imprisonment, and to such types of institutions as the court may direct, to the custody of the Attorney General of the United States or his authorized representative, who shall designate the places of confinements where the sentences of all such persons shall be served. The Attorney General may designate any available, suitable, and appropriate institutions, whether maintained by the District of Columbia government, the federal government, or otherwise, or whether within or without the District of Columbia. The Attorney General is also authorized to order the transfer of any such person from one institution to another if, in his judgment, it shall be for the well-being of the prisoner, or relieve overcrowding or unhealthful conditions in the institution where such prisoner is confined, or for other reasons.

The "Lorton Regulation Approval Act of 1982," D.C. Law 4-153, 29 D.C.Reg. 3484-3485 (Aug. 13, 1982)

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Lorton Regulations Approval Act of 1982."

Sec. 2. The Council of the District of Columbia approves the regulations setting forth the administrative procedures for adjustment and housing actions and the code of offenses governing residents of the Lorton Correctional Complex as adopted by the Director of Corrections on February 18, 1981, and published in the D.C. Register on February 27, 1981 (25 DCR 865).

Balanced Budget Act of 1997, Pub.L. 105-33 (Aug. 5, 1997), Title XI, National Capital Revitalization and Self-Government Act of 1997, Subtitle C, Criminal Justice, § 11201; D.C. Code § 24-1201 (1996, 1998 supp.).

(a) *Felons sentenced pursuant to the truth-in-sentencing requirements.* - Not later than October 1, 2001, any person who has been sentenced to incarceration pursuant to the District of Columbia Code or the truth-in-sentencing system as described in § 24-1211 shall be designated by the Bureau of Prisons to a penal or correctional facility operated or contracted for by the Bureau of Prisons, for such term of imprisonment as the court may direct. Such persons shall be subject to any law or regulation applicable to persons committed for violations of laws of the United States consistent with the sentence imposed.

(b) *Felons sentences pursuant to the D.C. Code.* - Notwithstanding any other provision of law, not later than

December 31, 2001, the Lorton Correctional Complex shall be closed and the felony population sentenced pursuant to the District of Columbia Code residing at the Lorton Correctional Complex shall be transferred to a penal or correctional facility operated or contracted for by the Bureau of Prisons. Such persons shall be subject to any law or regulation applicable to persons committed for violations of laws of the United States consistent with the sentence imposed, and the Bureau of Prisons shall be responsible for the custody, care, subsistence, education, treatment and training of such persons.

***